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KANG HOCK HIN v. VASANTHI R ANNAMALAI

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
SEE MEE CHUN JCA
LIM CHONG FONG JCA
B [CIVIL APPEAL NO: J-02(NCvC)(A)-2075-11-2022]
30 DECEMBER 2024

Abstract – *When the central object of clauses of a consent order is achieved, in this case, the cancellation of private caveats, the consent order is considered complied with, instead of breached.*

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CIVIL PROCEDURE: *Consent order – Breach – Allegation of – Whether private caveats withdrawn as envisaged by agreement – Whether word 'withdrawal' in consent order ought to be liberally interpreted – Whether central object of clauses of consent order achieved – Whether consent order complied with*

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By a share sale agreement ('agreement'), the respondent purchased from the appellant all the shares in SBK Property Sdn Bhd ('company'). Subsequently, a dispute arose between the parties concerning the interpretation of the agreement that resulted in the respondent commencing a suit against the appellant. The matter was, however, settled privately between the parties and they recorded a consent order ('consent order'). Consequently, the appellant procured Sie Kie Ching to withdraw the private caveat lodged by him and the entry of the caveat had thereafter been cancelled. The private caveat lodged by Sie Kie Won had been removed on the application of the company by the appellant as its director; hence, the entry of the caveat was also cancelled. As a result of the cancellation of the aforesaid private caveats, the appellant's solicitors released the RM350,000 paid by the respondent to the appellant. The respondent was, however, dissatisfied with the manner of cancellation of the aforesaid private caveats and, thus, instituted a suit against the appellant ('proceeding').The respondent's pivotal contention was that the appellant had breached the consent order by failing to pay any money to the caveators to withdraw the caveats. The caveats were instead removed by the appellant who had no authority to do so at the material times. The appellant refuted that he had fully and satisfactorily complied with the consent order. The trial judge found against the appellant ('judgment'). Dissatisfied, the appellant appealed.

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Held (allowing appeal)
Per Lim Chong Fong JCA delivering the judgment of the court:

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(1) The critical and pivotal issue revolved around the construction of the consent order, particularly cl. 3. Upon a careful reading of cl. 3 of the consent order, the appellant merely gave an undertaking to withdraw the caveats lodged by Sie Kie Ching and Sie Kie Won and thereafter upon

the withdrawal of the caveats, the appellant's solicitors may release the respondent's money of RM350,000 to the appellant. The central object of clauses of the consent order was to have both private caveats cancelled. This had been achieved. (paras 22-28)

(2) Clause 3 of the consent order had been complied with instead of breached when the payment of the RM350,000 was paid out to the appellant. In this regard, the word 'withdrawal' in cl. 3 of the consent order should be liberally interpreted contextually in view of its imprecision. There was no prejudice caused to the respondent because there was no evidence of any litigation brought against the company or the respondent by Sie Kie Won as the result of the cancellation of his private caveat. (para 28)

(3) In the premises, the trial judge erred when the declaratory reliefs sought by the respondent were allowed. There was no unjust enrichment or deceitful/dishonest conduct in the circumstances on the part of the appellant contrary to that as found by the trial judge, particularly when this proceeding had not been disposed of by way of trial to justify such findings of fact. Appellate intervention was warranted. (paras 29-31)

Case(s) referred to:

Balamoney Asoriah v. MMIP Services Sdn Bhd [2020] 1 CLJ 476 CA ***(refd)***

Goh Joon v. Kerajaan Negeri Johor & Ors [1999] 5 CLJ 335 HC ***(refd)***

Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn Bhd [1996] 3 CLJ 858 CA ***(refd)***

Legislation referred to:

National Land Code, ss. 325, 326

For the appellant - Dinesh Kanavaji Kanawagi & Rabia Abd Halim; M/s Rabia Farihan & Sures

For the respondent - Chandrakandan Sankaran & Maithily Manoher; M/s C Sankaran & Co

[Editor's note: For the High Court judgment, please see Vasanthi R Annamalai v. Kang Hock Hin [2023] CLJU 819; [2023] 1 LNS 819 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Chong Fong JCA:

Introduction

[1] This is an appeal against an alleged breach of a consent order recorded before the High Court.

[2] The appellant who is the defendant in the High Court is an individual.

[3] The respondent who is the plaintiff in the High Court is likewise an individual.

[4] We heard the appeal on 18 July 2024 and unanimously allowed the appellant's appeal with costs of RM10,000 subject to allocatur.

[5] We now provide the grounds of our decision below.

Background

[6] By a share sale agreement dated 25 February 2020 ("agreement"), the respondent purchased from the appellant all the shares in SBK Property Sdn Bhd ("company").

[7] The express terms of the agreement include the following:

> (4.2) The sum of Ringgit Malaysia Three Hundred Fifty Thousand (RM350,000.00) only to be paid by the Purchaser to the Vendor's solicitors who is authorised to pay to the two caveators named in the Recital 1(b) and (c) within twelve (12) months from the date of this Agreement.
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> (4.3) Upon receipt of the sum as stated in clause 4.2, the Vendors and/or Vendor's solicitors shall cause and procure a duly executed withdrawal of caveat from the two caveators namely in recital (b) and (c) before the sum of RM350,000.00 is released to the said caveators.

[8] Additionally, Schedule 1 of the agreement provides as follows:

> (8) The Company has no other bank borrowings and/or any encumbrances created over its assets for any bank borrowings except for the following:
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> (a) A loan from MB Rich Sdn Bhd (Company No. 933483-W) of Unit 5.07 Level 5 Plaza DNP, No. 59, Jalan Dato' Abdullah Tahir 80300 Johor Bahru pursuant to Money Lending Agreement dated 25/4/2018 for the sum as stated in the Statement of Account as per Appendix B and had entered Lien Holder's caveat under presentation No. 14570/2018 dated 3 May 2018.
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> (b) A loan from Sie Kie Ching (NRIC No. 651221-13-5179) and Sie Kie Won (NRIC No. 630331-13-5409) of Lot 753, 2nd Floor, Jalan Merpati, 98000 Miri, Sarawak for the sum of RM350,000.00 and had entered a private caveat under Presentation No. 17192/2018 dated 30th May 2018.

[9] Subsequently, a dispute arose between the parties concerning the interpretation of the agreement that resulted in the respondent commencing Johore Bahru High Court Originating Summons No. JA- 24(NCvC)-371-07/2020 against the appellant.

[10] The matter was however settled privately between the parties on 21 October 2020 and they recorded a consent order in the following terms in Bahasa Malaysia ("consent order"):

JA-24NCvC-371-07/2020

Encl No. 19

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JA-24NCvC-371-07/2020
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DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU

DALAM NEGERI JOHOR DARUL TAKZIM, MALAYSIA

SAMAN PEMULA NO. JA-24NCvC-371-07/2020

Dalam Perkara suatu Perjanjian Jual-Beli Syer (Share Sale Agreement) bertarikh 25.2.2020

DAN

Dalam perkara Syarikat SBK Property Sdn Bhd (No. Syarikat : 201701046815 (1260991-M)

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Dalam Perkara Seksyen 41 Akta Relif Spesifik 1950

DAN

Dalam Perkara Aturan 28 dan/atau Aturan 92 (4) KKM 2012

ANTARA

VASANTHI A/P R ANNAMALAI
(NO. K/P : 690510-08-6176)

... PLAINTIF

DAN

KANG HOCK HIN
(NO. K/P : 540412-01-5653)

... DEFENDAN

DIHADAPAN PESURUHJAYA KEHAKIMAN
EVROL MARIETTE PETERS
PADA 21 HB OKTOBER 2020

DALAM MAHKAMAH TERBUKA

PENGHAKIMAN PERSETUJUAN

TINDAKAN INI dipanggil pada hari ini untuk mediasi dalam kehadiran Mathews George (S Kandasamy bersamanya) peguamcara bagi pihak Plaintif dan T. A. Sivam (M.K Saw bersamanya) bagi pihak Defendan DAN didalam

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kehadiran Plaintif dan Defendan DENGAN PERSETUJUAN ADALAH DIHAKIMI seperti berikut:-

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1. Plaintif membayar wang sejumlah RM300,000.00 (Ringgit Malaysia Tiga Ratus Ribu sahaja) kepada Defendan untuk Defendan menyelesaikan penghutang-penghutang Syarikat SBK Property Sdn Bhd (No. Syarikat 201701046815 (1260991-M)) sepertimana yang dinyatakan di dalam Akaun Odit berakhir 2018 dan 2019.

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2. Jumlah RM300,000 yang dinyatakan di perenggan (1) di atas dibayar oleh Plaintif kepada Defendan seperti berikut:-

   (i) Jumlah RM50,000.00 dibayar pada hari ini iaitu pada 21.10.2020;

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   (ii) Baki sebanyak RM250,000.00 dibayar melalui 5 ansuran bulanan sebanyak RM50,000.00 setiap bulan yang dibayar pada atau sebelum 21.11.2020, 21.12.2020, 21.1.2021, 21.2.2021 dan 21.3.2021 dan cek-cek ansuran tersebut diatas nama Defendan Kang Hock Hin dihantar kepada peguamcara Defendan pada atau sebelum 26.10.2020 (hari Isnin).

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3. Selanjutnya Plaintif dikehendaki membayar RM350,000.00 (Ringgit Malaysia Tiga Ratus Lima Puluh Ribu sahaja) atas nama Defendan kepada Peguamcara Defendan sebagai stakeholder pada atau sebelum 7.2.2021 dan Defendan memberi akujanji menarik balik kaveat-kaveat yang dimasukkan oleh Sia Kie Ching dan Sia Kie Won dan selepas penarikan kaveat-kaveat tersebut barulah Peguamcara Defendan boleh melepaskan pembayaran RM350,000.00 tersebut kepada Defendan.

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4. Pihak-Pihak tidak mempunyai sebarang tindakan antara satu sama lain berkaitan dengan Perjanjian Jual Beli Saham bertarikh 25.2.2020 dan ini merupakan satu penyelesaian penuh dan muktamad.

5. Tiada perintah mengenai kos.

Bertarikh 21 hb Oktober 2020

HIDAYATUL SYUHADA BINTI SHAMSUDIN
Timbalan Pendaftar
Mahkamah Tinggi Malaya
Johor Bahru
Mahkamah Tinggi
Johor Bahru

PENGINDOSAN DI BAWAH ATURAN 45 KAEDAH 7 KAEDAH-KAEDAH MAHKAMAH 2012

Jika pihak-pihak yang dinamakan dalam ini tidak mematuhi Penghakiman ini, pihak-pihak yang berkenaan boleh dikenakan proses pelaksanaan bagi maksud memaksa kamu mematuhinya.

PENGHAKIMAN PERSETUJUAN ini telah difailkan oleh **TETUAN MATHEWS GEORGE & CO.** Peguambela & Peguamcara, Suite 03-05, Tingkat 3, Wisma Maria, Jalan Ngee Heng, 80000 Johor Bahru, Johor.
(No. Ruj: MG/JB 3486/2020 APPL/MG/zj)
No Tel: 07-2222 004;No Faks: 07-2222 115; Emel:gmathewsgeorge@yahoo.com

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[11] Consequently, the appellant on 20 January 2021 procured Sie Kie Ching to withdraw the private caveat lodged by him and the entry of the caveat has thereafter been cancelled.

[12] The private caveat lodged by Sie Kie Won has been removed on 8 June 2021 on the application of the company by the appellant as its director; hence the entry of the caveat is also cancelled.

[13] As the result of the cancellation of the aforesaid private caveats, the appellant's solicitors released the RM350,000 paid by the respondent to the appellant.

[14] The respondent is however dissatisfied with the manner of cancellation of the aforesaid private caveats and thus on 6 September 2021 instituted Johore Bahru High Court Suit Originating Summons No. JA-24(NCvC)-537-09/2021 against the appellant ("proceeding"). In this regard, the respondent prayed for the following reliefs in the proceeding (in Bahasa Malaysia):

> (i) Suatu deklarasi bahawa Plaintif dan/atau Syarikat SBK Property Sdn Bhd (No. Syarikat: 1260991-M) telah menunaikan obligasi kontrak mereka sepertimana dan setakat yang dinyatakan di dalam Klausa 4.2 dan 4.3 (Company Liabilities) dan Jadual 1 (Schedule 1) Klausa 8 (ii) Perjanjian Jual Beli Syer (Share Sale Agreement) bertarikh 25.2.2020 yang dimasuki di antara Plaintif dan Defendan iaitu dengan membuat pembayaran jumlah wang RM350,000.00 tersebut kepada Defendan untuk memperolehi penarikan balik kaveat-kaveat persendirian oleh penghutang-penghutang/pengkaveat-pengkaveat Sie Kie Ching dan Sie Kie Won tersebut;
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> (ii) Suatu deklarasi bahawa Plaintif dan/atau Syarikat SBK Property Sdn Bhd (No. Syarikat: 1260991-M) telah mematuhi perenggan 3 dalam Penghakiman Persetujuan bertarikh 21.10.2020 yang dimasuki melalui prosiding Mahkamah Tinggi Johor Bahru Saman Pemula No. JA-24NCvC371-07-2020 iaitu dengan membayar jumlah wang RM350,000.00 kepada Peguamcara Defendan untuk memperolehi penarikan balik kaveat-kaveat oleh Sie Kie Ching dan Sie Kie Won tersebut;
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> (iii) Suatu deklarasi bahawa Defendan adalah bertanggungan sepenuhnya sekiranya penghutang-penghutang/pengkaveat-pengkaveat bernama Sie Kie Ching dan Sie Kie Won tersebut memulakan sebarang tindakan undang-undang terhadap Syarikat SBK Property Sdn Bhd (No. Syarikat: 1260991-M) dan/atau memasuki semula kaveat persendirian ke atas tanah milikan SBK Property Sdn Bhd (No. Syarikat: 1260991-M).
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> (iv) Bahawa sekiranya Defendan tidak setuju kepada deklarasi-deklarasi yang dipohon oleh Plaintif di prayer (i), (ii) dan (iii) di atas, Defendan dikehendaki mengembalikan wang amanah RM350,000.00 tersebut yang telah dibayar oleh Plaintif kepada Defendan selaras Penghakiman Persetujuan bertarikh 21.10.2020 dalam masa empat belas (14) hari dari tarikh perintah Mahkamah ini.

(v) Kos permohonan ini adalah dibayar oleh Defendan kepada Plaintif; A

(vi) Lain-lain relif yang Mahkamah yang Mulia ini anggap adil dan sesuai.

In The High Court

[15] The respondent's pivotal contention is that the appellant breached the consent order by failing to pay any money to the caveators to withdraw the B caveats. The caveats were instead removed by the appellant who had no authority to do so at the material times.

[16] However, the appellant refuted that he has fully and satisfactorily complied with the consent order.

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[17] The learned judge found against the appellant ("judgment") and stated, *inter alia*, as follows in the grounds of judgment ("GOJ"):

> [10] This Court finds that the Defendant has committed a breach of the clear terms of the Consent Order and appropriated the money to himself instead of paying the sum of RM350,000.00 to the two (2) caveators to D settle the loans given by them to the Company (as stated in clauses 8 of Schedule 1 of the SSA) Likewise, the solicitors for the Defendant also breached their stakeholder duty by releasing the monies to the Defendant without waiting for the executed withdrawal of caveat forms as provided by clause 4.3 of the SSA.
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> [11] The sum of RM350,000.00 is not the only amount misappropriated E by the Defendant. As part of the Consent Order, the Plaintiff had earlier paid a sum of RM300,000.00 to the Defendant to settle all other debts of the Company, which was not disclosed in the SSA (see the other parts of the Consent Order, Exhibit V6 of the Plaintiff's Affidavit in Support Enclosure 2). However, this sum was never paid to the Company's F creditors but was again appropriated by the Defendant for himself. This is evidenced by the fact that a creditor called Bandari Simma Realty had filed a suit against the Company at the Johor Bahru Sessions Court (Suit no. JA-A252NCVC-200-11/2021)) for the sum of RM252,000.00 owed by the Company.
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> [12] The Defendant had not provided any evidence in his Affidavit in G Reply nor had he averred that he had paid the sum of RM350,000.00 to the caveators. Thus, the Plaintiff's averment that the Defendant had failed to pay the sum of the caveators remains unrebutted (see *Ng Hee Tong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609).
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> [13] One can thus, see the pattern of deceitful conduct by the Defendant. H
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> [14] The Defendant's failure to pay the sum of RM350,000.00 owed to the caveators (the debts were acknowledged by the Defendant in his representations in Schedule 1 to the SSA) would render the Company still liable for those debts and the Company's liability to the caveators will remain outstanding. Additionally, the failure by the Defendant to pay the I caveators was a clear breach of the terms of the Consent Order.

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> [15] To allow the Defendant to retain the sum of RM350,000.00, which was meant to discharge the liability of the Company to its creditors, would be clearly unjust as the Defendant would stand to benefit from his dishonest conduct and be unjustly enriched.

[18] The appellant is dissatisfied with the judgment and has on 28 October
B 2022 appealed to the Court of Appeal.

Findings Of This Court

[19] Before us, the parties basically re-hashed their contentions made in the High Court.

C **[20]** Our appellate function here is review of the judgment only as encapsulated in *Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858 where Gopal Sri Ram JCA (later FCJ) held as follows:

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> Now, it is settled law that in an appeal against the exercise of discretion by a Judge, the initial function of this Court is one of review only, there being no original discretion vested in this Court. Only after an appellant is able to demonstrate to a conviction that his case comes within one or more of those categories of cases in which appellate interference is warranted does this Court become entitled to exercise a discretion of its own.

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[21] The respondent in the proceeding sought for various declaratory reliefs against both the appellant and the company. The main plank of the respondent's contention is that the private caveats were not withdrawn by both Sie Kie Ching and Sie Kie Won as envisaged by the share sale agreement
F but were instead removed by the company; thus, the consent order has been breached.

[22] Upon our review, we find that the critical and pivotal issue revolves around the construction of the consent order, particularly cl. 3 thereof.

G **[23]** First and foremost, we are mindful that the construction of the consent order must be confined and subject to the "four corners" rule in that it must be read in its textual content as expressed excluding extraneous considerations.

[24] In this respect, we noted in passing that the obligation in cl. 3 of the
H consent order does not synonymously mirror cls. 4.2 and 4.3 of the share sale agreement. Nonetheless and in any event, both cls. 4.2 and 4.3 of the share sale agreement are extraneous considerations here and are hence irrelevant for purposes of construing cl. 3 of the consent order.

[25] Upon our careful reading of cl. 3 of the consent order, we find that the
I appellant merely gave an undertaking to withdraw the caveats lodged by Sie Kie Ching and Sie Kie Won and thereafter upon the withdrawal of the caveats, the appellant's solicitors may release the respondent's payment of RM350,000 to the appellant.

[26] As the matter of law, the appellant is definitely not in the position to withdraw the private caveat because that can only be done by the caveator based on s. 325 of the National Land Code. In other words, the obligation consented upon as expressed is unworkable.

[27] Consequently, the appellant, in actuality, procured Sie Kie Ching to withdraw his own private caveat but caused the company to remove the private caveat lodged by Sie Kie Won based on s. 326 of the National Land Code. On the facts here, Sie Kie Won neither contested the removal of the private caveat nor subsequently lodged a new private caveat.

[28] Notwithstanding the un-workability of cl. 3 of the consent order, we nonetheless find that the central object of clauses of the consent order is to have both the private caveats cancelled. This has been achieved and we therefore conclude that cl. 3 of the consent order has been complied instead of breached when the payment of the RM350,000 is paid out to the appellant. In this regard, we take the view that the word "withdrawal" in cl. 3 of the consent order should be liberally interpreted contextually in view of its imprecision. We are also mindful that there is no prejudice caused to the respondent because there is no evidence of any litigation brought against the company or the respondent by Sie Kie Won as the result of the cancellation of his private caveat.

[29] In the premises, we find the learned judge erred when the declaratory reliefs sought by the respondent were allowed. There is no unjust enrichment or deceitful/dishonest conduct in the circumstances on the part of the appellant contrary to that as found by the learned judge, particularly when this proceeding has not been disposed by way of trial to justify such findings of fact.

[30] Additionally, we find that the learned judge erred by having wrongly exercised his discretion in allowing declaratory reliefs against the company which is not a party in the proceeding following *Balamoney Asoriah v. MMIP Services Sdn Bhd* [2020] 1 CLJ 476 as well as declaratory reliefs that are hypothetical and/or premature following *Goh Joon v. Kerajaan Negeri Johor & Ors* [1999] 5 CLJ 335.

Conclusion

[31] For the foregoing reasons, we find that appellate intervention is warranted and we thus allowed the appeal as so ordered.